No. 84369-4

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, husband and wife; JOHN TONTZ and WANDA TONTZ, husband and wife; and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,

Petitioners/Appellants,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, et al., (No 82399-5)

and

DOUGLAS COUNTY, et al., (No. 82400-2)

Respondents.

On Petition for Review from Division III of the
Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; WASHINGTON FARM BUREAU; ADAMS COUNTY FARM BUREAU; CHELAN-DOUGLAS COUNTY FARM BUREAU; CLARK-COWLITZ COUNTY FARM BUREAU; FRANKLIN COUNTY FARM BUREAU; GRANT COUNTY FARM BUREAU, LEWIS COUNTY FARM BUREAU; MASON-KITSAP COUNTY FARM BUREAU; OKANOGAN COUNTY FARM BUREAU; SKAGIT COUNTY FARM BUREAU; SNOHOMISH COUNTY FARM BUREAU; STEVENS COUNTY FARM BUREAU; THURSTON COUNTY FARM BUREAU; WHATCOM COUNTY FARM BUREAU; WHITMAN COUNTY FARM BUREAU;

YAKIMA COUNTY FARM BUREAU; AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Washington Statutes

Miscellaneous

INTRODUCTION

Douglas County's decision to approve a bicycle and pedestrian trail running over miles of productive orchard lands is in direct conflict with the Growth Management Act (GMA), which prohibits local governments from converting agricultural lands to public recreational uses. RCW 36.70A.060, .177; *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 558, 562 (2000). But in *Feil v. E. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn. App. 394 (2009), the Court of Appeals held that the County's decision could not be challenged for compliance with the GMA because it believed that the decision was only a routine, administrative permit decision. Amici curiae, who represent the interests of Washington's farmers, property owners, and developers, are concerned about the loss of productive agricultural lands to public recreational projects and the impact that will have on the viability of Washington's agricultural industry. Douglas County's decision in this case will permanently eliminate agricultural uses, contrary to Washington's stated policy of protecting agricultural practice and resources. The County may not take this drastic action without complying with agricultural protections mandated by the GMA. This Court should reverse

the Court of Appeals' decision holding that the Growth Management Hearings Board lacked authority to review the County's decision.

ISSUE ADDRESSED BY AMICI

Douglas County Resolution No. TLS-08-09B created a recreational overlay district to authorize the construction of a bicycle and pedestrian trail running over miles of productive agricultural lands. The Court of Appeals erred when it upheld the Growth Management Hearings Board's conclusion that the creation of an overlay zone is a routine permit decision that is not subject to review for compliance with the GMA.

ARGUMENT

I

THE COUNTY'S CREATION OF A RECREATIONAL OVERLAY IS A LEGISLATIVE DECISION SUBJECT TO REVIEW UNDER THE GMA

Legislative decisions that alter a local government's comprehensive plan and/or development regulations are subject to review by the Growth Management Hearings Board for compliance with the GMA. RCW 36.70A.280; RCW 36.70B.020(1); *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 440 (2008). Routine, administrative permit decisions are subject to review by the superior court under the Land Use Petition Act

(LUPA) and are not required to comply with the GMA. RCW 36.70C.020(4); *Woods v. Kittitas County*, 162 Wn.2d 597, 610 (2007). Because overlay zoning is not one of the administrative permit decisions specifically excluded from review under the GMA,[1] this Court must look at the substance of the County's decision to determine whether it was legislative or administrative in nature. *Raynes v. Leavenworth*, 118 Wn.2d 237, 248-49 (1992); *Westside Hilltop Survival Comm. v. King County*, 96 Wn.2d 171, 176 (1981) ("Determining that an action is legislative or adjudicatory is more than a matter of semantics[.]").

Here, the record shows that Douglas County's decision to create the recreational overlay district altered mandatory agricultural policies and zoning regulations. *See* Douglas County Resolution No. TLS-08-09B, finding 13 (attached to Appellants' Opening Br. at App. B) (Finding that the decision constituted both a permit and "an amendment to the development regulations.").[2] The County's comprehensive plan prohibits the conversion

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[1] RCW 36.70C.020(4).

[2] During an early stage of this case, the superior court concluded that the County's decision to approve a recreational overlay district required legislative action because the recreational overlay constituted "an amendment to the development regulations." *See* AR 4895-96; Feil Opening Br. at (continued...)

of designated productive farmland and orchards to conflicting recreational uses: "[e]xisting and future agricultural activities *are permanent land uses* and provide significant benefit within the community." *See* Comprehensive Plan at 12-1 (emphasis added (attached to Appellants' Opening Br. at App. G) (emphasis added); *see also* Comprehensive Plan at 12-7 (The commercial agricultural designation is intended "to protect lands that meet the criteria for agricultural lands of long-term significance and to protect *the primary use of the land as agriculture and agricultural related activities.*") (emphasis added). The County's development regulations also contain mandatory development standards protecting commercial agriculture. DCC 18.36.010 (The purpose of the agricultural designation is "to preserve and encourage existing and future agricultural land uses *as viable, permanent land uses*, and as a significant economic activity within the community.")

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[2] (...continued)
App. B. (Resolution No. TLS-08-09B at findings 10, 13). The trial court explained: "It is difficult to see how this recreational overlay that allows a trail system to run through the [Commercial Agriculture] district for recreational purposes is not an application for a use that would offend the uses permitted as of right." *See* AR 4895-96. While the Board of County Commissioners disagreed with the court's decision, it did not appeal the decision, and ultimately complied with the court's order by adopting a resolution approving the recreational overlay. *See* Feil Opening Br. at App. B. (Resolution No. TLS-08-09B).

(emphasis added); DCC 18.36.010 (Existing agricultural activities within the AC-10 district "*are the primary land uses in this district.*") (emphasis added).

The County's decision to create the recreational overlay district was part of a larger policy debate about where to locate the bicycle and pedestrian trail, which decision is legislative in nature. *See Harris v. Hornbaker*, 98 Wn.2d 650, 658-59 (1983) (The decision where to locate a highway interchange is legislative.). The State respondents admit that the County engaged in legislative decision-making under the GMA when it approved the recreational overlay:

> [T]he county balanced four GMA goals in developing the recreational overlay ordinance: (1) the need for public safety under the transportation goal by taking pedestrians and cyclists off a state route; (2) the importance of providing public access to the Columbia River under the shoreline management goal; (3) the need for recreational opportunities under the recreation goal; and (4) the need to conserve agricultural resource lands.

State Respondents' Answer to Pet. Rev. at 9. Douglas County similarly stated that its decision to create a recreational overlay was intended to implement the statutory directive to provide multi-modal transportation facilities (RCW 47.06.100), while balancing a variety of land use planning

goals from the GMA.[3] *See* Douglas County Resp. Br. at 17-27. Simply put, the County made a policy decision that the public desire for a new recreational trail outweighed the orchardists' right to continue to put the land to agricultural use. Because this was a legislative policy decision, the orchardists have a right to challenge this decision for compliance with the GMA. RCW 36.70A.280.

The County's creation of a recreational overlay district changed its mandatory agricultural land use policies and regulations and, therefore, constitutes the type of policy decision that is subject to review under the GMA. The Growth Management Hearings Board has authority to review whether Douglas County Resolution No. TLS-08-09B failed to comply with GMA provisions that prohibit local governments from converting agricultural lands of long-term commercial significance to a public recreational facilities. *King County*, 142 Wn.2d at 558, 562; *see also Friends of the San Juans v. San Juan County*, Western Washington Growth Management Hearings Board

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[3] The GMA requires local governments to adopt land use policies and regulations by balancing a variety of requirements and goals. Among these is the requirement that the local government protect and enhance productive agriculture while at the same time addressing the goals of providing recreational and transportation opportunities. RCW 36.70A.170; RCW 36.70A.020(3), (9).

No. 10-2-0012, 2010 GMHB LEXIS 205, *49-*53 (Oct. 12, 2010) (The siting of transportation facilities must conserve and protect existing agricultural resources.). The orchardists' petition should be reinstated and remanded to the Growth Board for determination on the merits.

II

LOCAL GOVERNMENTS CANNOT USE OVERLAY ZONING TO AVOID THE GMA'S MANDATORY AGRICULTURAL PLANNING REQUIREMENTS

The only way to assure that a local government is adhering to the GMA's agricultural protections is to allow citizens to litigate petitions alleging noncompliance with the GMA before the Growth Boards. Richard L. Settle, *Symposium: Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 11 (1999) ("[L]ocal fidelity to GMA goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts."). The agricultural industry operates with low profits, even under normal conditions.[4] Unnecessary government intrusions onto agricultural lands—no

[4] The average 381-acre farm in our State generates less than $50,000 in net profits. *See* U.S. Dep't of Agric., National Agricultural Statistics Service, 2007 Census Publications, State Profile: Washington, *available at* (continued...)

matter how small—further damage profit margins, increase production costs, and threaten the viability of ongoing agricultural activities. *See* Settle, *supra*, at 22 ("Allowing conversion of resource lands to other uses, or allowing incompatible uses nearby, impairs the viability and productivity of resource industries.").

The record in this case demonstrates how much impact a conflicting public use can have on the ongoing viability of agricultural lands. Even after all of the County's mitigation requirements are met, the trail will permanently remove approximately 24 acres of orchard lands from production. AR Vol. 35, CP 6701. This represents a loss of nearly 500 mature fruit trees that produce $74,000 in annual income to the affected orchardists. AR Vol. 14 at CP 2451-53. For one orchardist, the trail will have such a profound impact on the viability of his 26-acre orchard (it will bisect his land and remove 5 acres of fruit trees) that he will be forced to stop growing fruit. AR Vol. 14 at CP 2454-55. There is more. The County's decision placed significant restrictions on routine agricultural activities that will result in delay and increased production costs. For example, the County's decision restricts

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[4] (...continued)
http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/County_Profiles/Washington/index.asp (last visited Feb. 3, 2011).

pollination, aerial spraying, and removal of moisture by helicopter in order to provide a buffer between agricultural and recreational activities.[5] *See* Douglas County Hearing Examiner Decision at 10, findings of fact 3.36-3.37 (Attached to Feil Opening Br. at App. C). The decision also restricts the farmers' ability to freely access land on both sides of the trail, limiting the times when they can move equipment across the trail. *Id.* at finding 3.41; AR Vol. 14 at CP 2430-31. Thus, even a project as small as a 20-foot wide recreational trail running through productive agricultural lands can have a profound impact on a farm's ongoing viability.

The incremental threat posed by public projects like Douglas County's recreational trail is precisely why our Legislature included agricultural protections in the GMA. *See King County*, 142 Wn.2d at 556 (The GMA requires that local government adopt land use policies and regulations that protect agricultural lands from being converted to public recreational uses); *City of Arlington v. Cent. Puget Sound Growth Mgmt.*

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[5] Due to conflicts between the trail and ongoing agricultural activities, three bee keepers stated that they would relocate their hives away from the area (increasing the cost of local pollination) to avoid potential liability if the trail is installed. AR Vol. 5 at CP 793-95. And two owners of helicopter companies stated that they would not provide aerial spraying or moisture control services to the orchards because of liability concerns due to the recreational trail. AR. Vol. 6 at CP 801-03.

Hearings Bd., 164 Wn.2d 768, 780 (2008) (citation omitted) (Local development regulations must "assure the conservation of" designated agricultural lands).[6] As a matter of statewide land use policy, a farmer's right to preserve his or her land for agricultural purposes trumps the public desire to build new recreational facilities. *King County*, 142 Wn.2d at 562 ("Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture."). Local governments cannot use innovative zoning techniques, like overlay zoning, to avoid the mandatory GMA requirements protecting agricultural lands. *See Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 508-09 (2005) (A zoning technique that allows designated agricultural land to be converted to recreational uses will not be permitted if it substantially interferes with the County's duty to maintain and enhance the agricultural industry.). The Court of Appeals' decision should be reversed and this matter remanded to the Growth Board to determine whether Douglas County's creation of the recreational overlay zone complied with the GMA.

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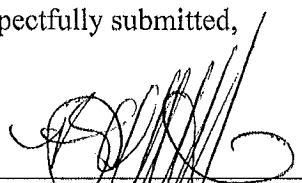
[6] *See also City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 48 (1998) (citing Gary Pivo, *Is the Growth Management Act Working? A Survey of Resource Lands and Critical Areas Development Regulations*, 16 U. Puget Sound L. Rev. 1141, 1145 (1993))

CONCLUSION

For the foregoing reasons, Amici curiae respectfully request that this Court reverse the Court of Appeals' decision holding that the Growth Management Hearings Board lacked authority to review the County's decision.

DATED: February 4, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

I, BRIAN T. HODGES, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On February 4, 2011, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL., IN SUPPORT OF PETITIONERS were sent via e-mail and placed in envelopes and sent by First Class United States Mail addressed to the following:

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Rec. 2-4-11

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Dear Clerk:

Attached for filing in *Feil v. EWGMHB,* No. 84369-4, are copies of the *Motion for Leave to File Amicus Brief in Support of Petitioners* and the proposed *Amicus Curiae Brief* (with attached declarations of service) of amici applicants:

> Pacific Legal Foundation; Washington Farm Bureau; Adams County Farm Bureau; Chelan-Douglas County Farm Bureau; Clark-Cowlitz County Farm Bureau; Franklin County Farm Bureau; Grant County Farm Bureau; Lewis County Farm Bureau; Mason-Kitsap Farm Bureau; Okanogan County Farm Bureau; Skagit County Farm Bureau; Snohomish County Farm Bureau; Stevens County Farm Bureau; Thurston County Farm Bureau; Whatcom County Farm Bureau; Whitman County Farm Bureau; Yakima County Farm Bureau; and Building Industry Association of Washington

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